

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATION BOARD  
REGION 9

SUD-CHEMIE, INC.

Employer

and

Case 9-RC-18011

INTERNATIONAL CHEMICAL WORKERS UNION  
COUNCIL, UFCW

Petitioner

**REGIONAL DIRECTOR'S DECISION AND**  
**DIRECTION OF ELECTION**

**I. INTRODUCTION**

The Employer is engaged in the manufacture of chemical catalysts and performance additives at its Louisville, Kentucky, West Plant Complex, the only facility involved in this proceeding. The Employer also operates a catalyst manufacturing plant in Louisville at its South Plant Complex, where since about 1948, 75 hourly paid production and maintenance employees have been represented by the International Brotherhood of Teamsters, Local 89. The South Plant is located about six miles from the West Plant. In addition to its Louisville operations, the Employer has other unspecified manufacturing operations, including some located in foreign countries. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's production, maintenance and warehouse employees employed in the Employer's Performance Additives Division, hereinafter PA Division, at the West Plant Manufacturing Complex, excluding all salaried employees, laboratory employees, and guards and supervisors as defined in the Act. There is no history of collective bargaining affecting any of the employees involved in this proceeding.

The two principal issues over which the parties disagree is whether the petitioned-for unit which consists of about 28 production, maintenance, and warehouse employees limited to the PA Division is an appropriate unit for purposes of collective-bargaining and whether it is appropriate to entertain the petition at a time when the sale of the Employer's PA Division is under active consideration. The parties also disagree over whether three quality control employees and a stockroom clerk should be included in the petitioned-for unit if it is found to be appropriate. Contrary to the Petitioner, the Employer asserts that the only appropriate unit is a wall-to-wall unit of about 193 employees consisting of all of its employees employed at the West Plant in the following classifications: all production and maintenance employees, shipping and receiving, screening, and warehouse employees, quality control technicians, the stockroom clerk, and pilot

plant employees. The Petitioner indicated that it does not wish to proceed to an election in the unit advocated by the Employer. In addition, the Employer asserts that it is inappropriate to entertain the Petitioner's petition at this time and conduct an election in this matter because the sale of the PA Division to an unnamed buyer is imminent and definite.

As more fully explained below, I find that the unit sought is an appropriate unit for purposes of collective bargaining. Moreover, I find that the evidence does not demonstrate that the sale of the PA Division is imminent and definite and, accordingly, I conclude that it is appropriate to entertain the instant petition and to promptly direct an election in this matter in the order to effectuate the purpose and policies of the Act. Additionally, I find that the stockroom clerk does not share such a substantial community of interest with the petitioned-for unit such as to mandate his inclusion in the unit. Accordingly, the stock room clerk will be excluded from the unit found appropriate. With regard to three quality control employees who perform quality control functions for the PA Division, I find that they share a sufficient community of interests with employees in the unit found appropriate to warrant their inclusion in the unit. In reaching this conclusion, I note that should the potential sale of the PA Division be realized the failure to include these employees in the unit would result in a residual group of three employees who would have little chance of obtaining effective collective-bargaining representation should they so choose. Therefore, I will include the three quality control employees who perform performance additives testing and quality control functions in the proposed unit.

In reaching my determination on these issues, I have considered not only the arguments made by the parties at the hearing in this matter, but also those contained in the post-hearing briefs and supplemental briefs filed by the parties. In explaining how I came to my determination on these issues, I will first describe the Employer's operations and then the dispositive facts governing the nature of the employment relationship. The facts will be followed by an analysis of the issues in relation to the applicable legal precedent.

## **II. OVERVIEW OF OPERATIONS**

As noted, the Employer is a manufacturer of catalysts and performance additives. In this regard, the West Plant has two separate business units, the Catalyst Division and the PA Division. The catalysts manufactured by the Employer are used by various industries, including the ammonia hydrogen industry, polygas industry, and the steel industry, to generate a chemical reaction in the manufacturing process. Performance additives are manufactured for the paint, cosmetics and related industries. The Employer utilizes two distinct processes in the manufacture of paint additives. Its Tixogel product is manufactured in its rheological plant and is used in oil based paints to enhance even flow for surface application. Its Opti-flow product is an associated thickener manufactured in the associated thickener plant and is used in water based paints. Catalysts and performance additives products are described in the record as "dissimilar."

The Employer's West Plant Complex is a campus like operation spanning several city blocks, comprising about 16 buildings which include manufacturing facilities, warehouses, laboratories, and a production office. The Employer's three quality control employees who perform quality control functions for performance additives work out of the Employer's Hill Street offices, where there are laboratory facilities and corporate offices. The Hill Street offices

are located three to five blocks from the West Plant or alternatively described as one-half mile to a mile away. Quality control personnel for the Catalyst Division work in a laboratory located near the principal catalyst manufacturing facilities

The West Plant Catalyst Division has approximately 149 hourly production, maintenance and warehouse employees of whom about 105 employees are in production, about 30 are in maintenance, and another 12 to 14 employees are warehouse workers. The Catalyst Division also includes about six Pilot Plant lab technicians, a stockroom clerk, and about six quality control technicians. The PA Division at the West Plant is comprised of 20 production employees, 3 warehouse employees, and 5 maintenance employees for a total of 28 hourly employees. Included among the 20 production employees are 5 lead operators and included among the 5 maintenance employees is 1 electrician. As noted above, three quality control technicians are engaged in quality control functions for performance additives.

The Employer's PA Division worldwide has two components, one devoted to coating processes and another devoted to plastics additives. The Louisville operation only involves coatings applications. The record discloses that in about November 2004, a prospective buyer, who is unnamed in the record, approached the Employer about purchasing the PA Division. This potential purchase includes the Louisville operation and the Employer's PA Division operations located overseas. In about April 2005, representatives of the Employer met with West Plant employees and formally advised them of the possible sale of the PA Division. Additionally, employees were informed at that time that the Employer was freezing employee transfers out of the PA Division to the Catalyst side, pending the outcome of the possible sale. On about July 12, 2005, the Employer rescinded this freeze because the timeframe for resolving the issue of a potential sale had extended far longer than the Employer had originally anticipated. Employees had been told in April that the freeze on transfers was implemented to ensure the prospective purchaser would have an experienced workforce to continue producing coatings products. At the time of the initial hearing and the second hearing in this matter, the sale had not been finalized and approval from certain European regulatory bodies had not yet been obtained.

### **III. EMPLOYMENT FACTS**

Employees in the Catalyst and PA Divisions are structured into nine teams, with each team operating around a given process or system in the manufacture of a particular product or related products. In this regard, the employees in the PA Division constitute a single team, whereas there are eight separate employee teams within the Catalyst Division. The teams within the Catalyst Division include the specialty extruding team, also known as SPECS; the precipitation team; the warehouse team; Houdry team; building 12 team; the nitrate team, the plant 4 team, and the FETTE team.

Each team has a separate reporting hierarchy. Thus, there is a lead operator on each shift for each team. The lead operators were stipulated by the parties to be non-supervisory employees. Above the operators and lead operators, each team has a team coordinator who is stipulated by the parties to be a statutory supervisor. Each team coordinator reports to a production manager or managers for his or her particular team. The record discloses that openings for lead operators and team coordinators are first offered to interested applicants within

each team and the position is offered plant-wide only if there are no interested and qualified applicants within the team. It is not clear from the record whether job openings below lead operator are also first offered to intra-team applicants prior to being offered plant-wide. One witness testified that the situation had not arisen because all of the operators and maintenance employees were already at maximum pay grade levels.

The team coordinator for the PA Division is Eric Williams. Williams reports to Production Managers Rob Drucker and Wayne Coffey, who are responsible for Tixogel and Opti-flow, respectively. Drucker and Coffey report to Operations Manager Bob Weis. Weis reports to Business Unit Manager Dr. R. Siva Subramanian (Siva). Siva reports to Global Business Unit Manager Don Colyer. Colyer has dual reporting responsibilities. For employee disciplinary issues and business dealings, he reports to Dr. Thomas Marks, who is president and CEO of Sud-Chemie, Inc. For issues associated with the PA Division as a business unit, he reports to Hans Wernicke, who is based in Germany. The PA Division also includes Maintenance Supervisor Steven Lewis and Warehouse Manager Ted Kessinger. The quality control employees in the PA Division apparently report to Allen Steinmetz, whose title is not reflected in the record. However, it appears to be a separate reporting line from the supervisors and managers to whom the production and maintenance employees report.

The Catalyst Division has 8 team coordinators and 4 shift coordinators, who have broader authority for each of the 12-hour shifts. The Catalyst Division team coordinators report to Production Managers Cathy Holthausen, Richard Allen, and Steve Ledford. The Catalyst Division also includes a warehouse manager, a maintenance manager, and three maintenance supervisors. Warehouse Manager Scott Etherton is over catalyst warehousing operations at the west plant and the south plant. All of these stipulated supervisors report to Catalyst Operations Manager Bill Furlong. Furlong reports to Business Unit Manager and Executive Vice-President Dr. John Ray. Ray, like his counterpart Colyer, has dual reporting responsibilities. For employee disciplinary issues and business dealings he also reports to Dr. Thomas Marks. For issues associated with the Catalyst Division as a business unit, he reports to Hans Yocum Muller who is based in Germany. Thus, with one exception, the PA Division and Catalyst Division have separate managerial and supervisory structures up to level of Dr. Thomas Marks, who is the Employer's highest ranking manager in the United States. The single exception involves the shift coordinators. As there is no shift coordinator in the PA Division at the West Plant, a shift coordinator may be contacted by a team leader or perhaps a lower level supervisor on weekends or after hours, if necessary, to address an emergency situation. The record lacks specific examples of shift coordinators being contacted under such circumstances. However, there is some indication that they have been contacted in the past when necessary for PA Division personnel to gain access to the stockroom when the stockroom clerk is off duty. Catalyst Division shift coordinators are not called upon to supervise PA Division employees.

The West Plant employees work a variety of shifts to allow the Employer to maintain a 24-hour a day, 7 days a week, continuous operation, although some processes only run during the weekdays. In this regard, many employees work on one of the Employer's four 12-hour shifts known as A, B, C, and D shifts and other employees work 8-hour shifts. Production and maintenance employees in the PA Division work a 6 a.m. to 6 p.m. shift from Sunday through every other Wednesday and from every other Wednesday through Saturday. Many of the production and maintenance employees in the Catalyst Division work similar 12-hour shifts from

7 a.m. to 7 p.m., although it appears that some production and maintenance employees in the Catalyst Division work 8-hour shifts. Warehouse employees in both divisions work 8-hour shifts Monday through Friday.

All of the Employer's West Plant employees in the Catalyst Division and in the PA Division receive similar wages and benefits, including a 401(K) plan and the same medical and dental plans. In addition, all of the production and maintenance employees employed at the West Plant are similarly classified as maintenance grade employees 2 through 5 or as operators 1 through 4. The record discloses that nearly all operators are at the Operator 4 level and that almost all maintenance personnel are at the Grade 4 level, with the exception of electricians who may be at the Grade 5 level. The Employer recently hired approximately a dozen operators in the Catalyst Division and these employees are currently at the Operator 1 and 2 levels. Grade 4 operators receive \$19.82 an hour plus shift differential and a seniority premium for those with more than 5 years of service that ranges from 35 cents to 80 cents an hour. Operator 1 employees start at \$14.50 an hour and move to \$16 an hour after a year. Grade 4 and 3 maintenance employees receive \$21.62 and \$22.71 an hour, respectively, excluding the aforementioned shift differential and seniority premium. A new Grade 2 maintenance employee starts at \$18.22 an hour and progresses to \$19.65 an hour after a year. All of the Employer's West Plant employees are entitled to the same benefits.

Catalyst Division and PA Division employees each have separate shower, locker rooms, break and lunch facilities and they all punch timeclocks. All hourly employees at the West Plant wear the same type of uniforms. Human resource functions for the West Plant are centrally administered. All disciplinary action and hiring and firing functions are routed through the Employer's human resources (HR) department. However, disciplinary action is often initiated by supervisory personnel and these actions are then reviewed by the HR department. In this regard, HR Manager Scott Hinrichs testified that he participates in all discipline at the West Plant at "some level."

Hiring is coordinated through human resources by a HR administrator who reviews applications and bids and presents the suitable candidates to the hiring manager of the particular department in which there is an opening. Applicants for open positions are then typically interviewed by the hiring manager and possibly by another manager from the department. Hinrichs has the authority to veto any candidate selected by a hiring manager, although the record does not disclose whether he has ever exercised this prerogative. State and federally-mandated safety training is conducted by the HR department with employees in the PA Division and Catalyst Division attending the same training sessions on at least some occasions. Other regular training is also conducted by the HR department with employees of both divisions present at the same sessions. Personnel files for hourly employees at the West Plant are centrally located and are maintained by the HR department. Layoff of employees, like the filling of job openings, are based on seniority on a plant-wide basis after a consideration of the affected employees skills and abilities.

Temporary transfers of employees between the Catalyst Division and the PA Division are rare. This is so, in part, because the products are dissimilar and at least some training is required before an operator or maintenance employee from one division could adapt his or her skill set to

working on products and equipment in the other division. One example was provided of an employee from the Catalyst Division performing services in the PA Division on a temporary basis. However, the instance cited involved a maintenance supervisor who brought a cherry picker to the PA Division for a use ancillary to the manufacturing operations. A second example occurred during the hearing when a warehouse employee from the Catalyst Division was used to fill in for a warehouse employee in the PA Division who was involved in the hearing. A maintenance employee in the PA Division testified affirmatively that there has been no temporary interchange of maintenance employees between Catalyst Division and the PA Division since at least 2001.

The only other example of temporary interchange involved a line shut down in the PA Division occurring about 2 years prior to the initial hearing in this matter as a result of an explosion affecting the production process. As a result of the temporary shut down of some PA Division processes, about three employees were voluntarily transferred to the Catalyst Division for about 30 days. There is no other testimony of any other temporary interchange between the two divisions in the last several years. The record discloses that temporary personnel needs in both divisions are typically filled through the use of temporary agencies that supply workers or, in the case of specialized maintenance needs, the use of outside contractors. Day-to-day work-related contact between employees in the two divisions does not typically occur.

Prior to the recent transfer “freeze” in the PA Division there had been some permanent interchange between employees in the Catalyst Division and the PA Division. The record discloses that almost every employee now employed in the PA Division began his or her employment in the Catalyst Division. In fact, new hires typically begin their employment in the Catalyst Division. Additionally, prior to the “freeze,” employees occasionally transferred between the two divisions as jobs came open for bid. One estimate puts recent overall job bidding at the West Plant as occurring three to five times per month, with at least some of those bids involving a permanent transfer between divisions. However, there was testimony that, with the inception of separate business units 3 to 4 years earlier, the incidences of permanent transfers have decreased significantly. Other record evidence indicates that this may be the result of team based prioritization for bidding purposes, a low incidence of employee turnover and an overall reduction of the workforce. In this regard, a PA Division mechanic testified that the only permanent interchange between divisions of maintenance employees, that he was aware of, involved his own transfer from the Catalyst Division to the PA Division in 2001.

The Catalyst Division and PA Division each has its own facilities and equipment for manufacturing and warehousing their respective products. However, a few large capital items are shared between the two divisions. For example, the record discloses that the previously described cherry picker is shared between the two divisions at the West Plant. Other shared resources include steam and natural gas, which are generated or emanate from Building 12 in the Catalyst Division. Also, each division has its own warehouse and warehouse employees who are engaged in moving, shipping, and the storage of product. Three PA Division employees perform warehouse functions although, like the production employees, they are classified as operators. A stockroom in the Catalyst Division is utilized by all employees in the West Plant, primarily for parts that are not in regular demand.

Some of the manufacturing machinery and equipment used in the Catalyst Division is similar to the manufacturing machinery and equipment used in the PA Division. However, the PA Division's processes and the Houdry process are considered to be the most "delineated" of the Employer's processes at the West Plant. In this regard, specialized machinery used in the PA Division's processes include six identical centrifuges and three Gavlin Mills of differing configurations.

The main stockroom is located in Building 1, which is centrally located within the Catalyst Division, and is staffed by a single clerk. The PA Division's performance maintenance personnel occasionally visit the stockroom for supplies and equipment that are not normally used or maintained by the PA Division. The stockroom clerk works 8 hours a day, 5 days a week and reports to Catalyst Division Maintenance Manager Clyde Eckert. The stockroom is a shared resource between the Catalyst and PA Divisions, but the record testimony indicates that the clerk may be reluctant to provide PA Division personnel with certain equipment and supplies if stock in those items is low and there is a need for the items on the Catalyst side. The record discloses that the work related interaction between the stockroom clerk with PA Division personnel is occasional at best and limited to the maintenance employees.

The three quality control technicians assigned to the PA Division are located on the third floor of the remote Hill Street building. Their principle duties are to test the material produced to ensure its integrity and to convey the results of those tests to the PA Division's production personnel. Test results are transmitted to the PA Division's operations approximately every 3 hours by facsimile transmission. Typically, samples for testing are transported to the Hill Street offices by an outside courier service for testing by quality control technicians. Only occasionally does a quality control technician go to one of the manufacturing facilities for the purpose of performing functions in connection with his or her job. On these occasions, they may have some work-related interaction with the PA Division's production personnel.

#### **IV. REOPENED RECORD FACTS**

The record in this matter was reopened on July 26, 2005 for the limited purpose of taking additional testimony and evidence concerning the sale of the Employer's PA Division, including the details of the sale, the circumstances surrounding the sale, and the effects of the sale on the employment status of the employees currently working in the PA Division at the West Plant. The vice-president of human resources, Chuck Maisch, provided hearsay testimony that the principle negotiators of the prospective sale of the PA Division to a still unidentified purchaser reached an oral agreement on all substantive details associated with the transaction on July 14, 2005. Based on conversations with the principle negotiators of the deal, Maisch projected that it was "reasonable" to expect the deal might be closed by the end of October or early November. He also testified to his "feeling" that the written agreement would be prepared and signed by the end of September. However, he also conceded that it was "possible" that the sale still may not occur. One possible barrier to the sale is that the purchaser must obtain approval of the deal from the European Commission on Antitrust. According to Maisch, he has been advised that this process is underway and that approval is expected within the projected timeframe for closure of the deal.

Maisch testified to his understanding that if the sale goes forward, all of the employees in the PA Division will be offered positions with the purchaser with wages and benefits quite similar to those presently in effect with the Employer. The lone exception to the inclusion of the PA Division work force with the sale is a high ranking manager with duties in the Catalyst Division and the PA Division. There is no expectation that the freeze on transfers will be reintroduced.

## **V. THE LAW AND ITS APPLICATION**

The primary issues to be resolved are: (1) whether it is appropriate to entertain the petition at a time when the sale of the Employer's PA Division is under active consideration and, (2) whether the unit of about 28 production, maintenance, and warehouse employees limited to the West Plant operations of the PA Division is appropriate for purposes of collective bargaining. First, I will set forth the applicable precedent and address the Employer's argument that the petition should be dismissed in view of the prospective sale of the PA Division to an unidentified purchaser. I will then set forth the applicable precedent and address the Employer's argument that the smallest appropriate unit must consist of a wall-to-wall unit of the Employer's West Plant production, maintenance, and associated employees employed in both the PA and Catalyst Divisions.

### **A. Possible Sale of the Performance Additives Division, Coatings Industry Group**

The Board has long held that mere speculation as to an employer's future operations will not constitute a basis to dismiss an election petition. See, *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997), citing, *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976); *Gibson Electric*, 226 NLRB 1063 (1976). However, when the issue involves a definite and imminent plant closure or permanent layoff of the workforce the Board will dismiss the petition. *Hughes Aircraft Company*, 308 NLRB 82 (1992); *Larson Plywood Company, Inc.*, 223 NLRB 1161 (1976). It is also well-settled that when an employer's current workforce is substantial and representative of the complement of employees to be employed in the reasonably foreseeable future that the direction of an immediate election is appropriate. *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000); citing *Toto Industries, (Atlanta)*, 323 NLRB 645 (1997); *General Cable Corp.*, 173 NLRB 251 (1968). Conversely, a representation petition will be dismissed when changing circumstances establish that the existence of a substantial and representative complement cannot be determined until the change has occurred. *Cooper International, Inc.*, 205 NLRB 1057, 1058 (1973).

*Yellowstone* involved the imminent relocation of an employer's operation at a time when a representation petition was pending. In *Yellowstone*, the Board held that the employer's current employees constituted a substantial and representative complement of the employer's projected workforce and directed an election. Supra at 387. The Board distinguished *Cooper* by noting that in *Yellowstone*, unlike *Cooper*, there were several facts that made the continued existence of a substantial and representative complement at the employer's new operation a virtual certainty. Id. In reaching this conclusion, the Board noted that the new facility was only one and a half miles away from the existing facility, the nature of the work and functions would be unchanged, and there would be no hiatus between the closing of the existing facility and the



opening of the new. Supra at 386. In *Cooper* the new facility was located in an adjacent town about 18 to 25 miles away from where most of the workforce lived; many in the workforce did not own their own vehicles; and, public transportation between the two towns was inadequate. Id.

The Board has also held that the substitution of one employer for another at the same location without interruption of employment of the unit or a change in any essential attribute of the employment relationship does not preclude the direction of an election. *Allan W. Fleming, Inc.*, 91 NLRB 612 (1950). Nor does a change in the employing entity adversely impact the validity of a certification of representative which represents “the will of the employees with respect to their choice of a bargaining representative, and the consequent obligation to bargain subsists notwithstanding the change in the legal ownership of the business enterprise.” *Stonewall Cotton Mills*, 80 NLRB 325 (1948). In *Norfolk Maintenance Corporation*, 310 NLRB 527, 528 (1993), a successorship involving a petitioned-for unit was imminent, but the Regional Director, with Board approval, did not find this a bar to the conduct of an election where there appeared to be no change in the employing industry and the entire workforce of the predecessor had been hired by the successor.

Based on the facts detailed above, the applicable precedent, and the record as a whole, I find that the potential sale of the Employer’s PA Division is neither definite nor imminent. Thus, the record discloses that the Employer and its unidentified suitor have been discussing the possibility of a sale since at least August 2004. Toward this end, the Employer and the prospective purchaser entered into a letter of intent which, in part, provides the prospective purchaser with exclusive rights to buy the PA Division operations within a certain timeframe. The timeframe of that letter of intent has been extended at least five times.

According to HR Vice-President Maisch, all major components of a purchase have been agreed to, but there is still no signed agreement and none is expected before the end of September. Additionally, certain regulatory hurdles must be overcome before the deal can be finalized. Maisch’s end of October or early November prediction regarding the finalization of the sale is thus subject to certain variables, some within the control of the parties as well as others that are not. Moreover, when evaluating this testimony, I am keenly aware that Maisch was not involved in the negotiations and that his testimony in this area is hearsay unaccompanied with other evidence which would make his assertions anything more than mere speculation. Thus, his testimony is somewhat unreliable, particularly when the issue to which he is testifying involves issues of certainty and imminence. Finally, I am cognizant of the fact that the parties obviously anticipated that this process would culminate in a sale or other disposition in a much shorter timeframe, given the Employer’s freeze on employee movement between divisions, its subsequent lifting of that freeze, and the repeated need to extend the effective date of the original letter of intent. Accordingly, I am not convinced that the prospective sale is either imminent or definite, in stark contrast to the situation in *Larson Plywood*, supra, where the Board of Directors and stockholders had made a written resolution to dissolve the corporation’s assets within 90 days of having made the resolution. Supra at 1161. Thus, I find that the conduct of an immediate election is appropriate.

Even assuming that it could be demonstrated that the sale of the PA Division is both definite and imminent, the Employer's evidence is that all of the employees in the proposed unit will be offered comparable or the same positions with the putative successor employer at the same location and at similar, if not identical, rates of pay, scales of pay, and benefits. Under these circumstances, the probability that the existing complement of employees would be substantial and representative of the unit following a sale is a near certainty as it is likely that all or nearly all of the employees in the unit will accept positions with the putative successor. See, *Yellowstone*, supra. Thus, the employees in the prospective unit could benefit from an immediate election. If the Petitioner is selected to represent the employees as a result of the outcome of the election, then it will be in place as the exclusive collective-bargaining representative to represent employees' interests during the pendency of any sale, during the transition process if a sale occurs, and the employees will benefit from having a representative that will have additional time to establish itself internally as well as to prepare for negotiations for an initial collective-bargaining agreement, regardless of the identity of the employer.

The Employer's argument that a possible successor employer will not have the opportunity to be heard on important issues such as the appropriateness of the petitioned-for bargaining unit misses the mark. Issues regarding the appropriateness of the proposed unit have been fully litigated by the Employer. It is the Section 7 rights of employees that are of paramount concern under the Act and in this regard, the Board must balance the objective of insuring maximum employee participation in selecting a bargaining representative against the goal of permitting employees to be represented as quickly as possible. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 48, 107 S.Ct. 2225, 2238, 96 L.Ed.2d 22 (1987). Finally, the Employer's concern about the possible successor employer's ability to be heard on these issues is disingenuous because the Employer refused to disclose the identity of this potential successor.

In connection with the above contention, the Employer's reliance on *Hughes Aircraft, Company* to support its position that the petition should be dismissed because the "real party in interest is absent" is misplaced. 308 NLRB 82 (1992). *Hughes* involved an employer's imminent cessation of its operations and the petitioner's attempt to seek a multi-employer bargaining unit in a single unit by contending that prospective subcontractors who were to assume the employer's guard operations would become joint employers with the employer. The Board agreed with the Acting Regional Director's decision to dismiss the petition because the Employer's cessation of its operations was imminent. The Board added that it would not sanction a multi-employer bargaining unit because the subcontractors were not a part of the proceeding had not been served, and had expressed its consent to multiemployer bargaining in the unit sought – an issue not present here. *Id.* Thus, *Hughes* is inapposite. Finally, because I have concluded that there is no credible evidence that a sale is imminent or definite, I need not address the Employer's argument in its brief that meaningful bargaining could not take place if the Petitioner was certified by the Board as the employees' exclusive collective-bargaining representative.

Having fully addressed the arguments surrounding the possible sale of the PA Division, I will turn my attention to whether a unit limited to the PA Division is appropriate.

## **B. Community of Interest Analysis**

Consideration of both the scope and composition of a proposed bargaining unit requires an evaluation of traditional community of interest factors. See, *South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.)*, 425 U.S. 800, 805 (1976); *Edenwald Construction Co., Inc.*, 294 NLRB 297 (1989). As previously stated, the Employer insists that only a wall-to-wall unit of employees encompassing its entire West Plant, is appropriate, whereas the Petitioner seeks to represent only those employees employed in the PA Division. In addition, the Petitioner would exclude the stockroom clerk from any unit found appropriate while the Employer would include the stockroom clerk. The Employer would also include the three quality control technicians who perform quality control testing functions for the PA Division. The Petitioner has indicated that it would participate in an election in a unit containing the quality control technicians if I deemed their inclusion in the unit appropriate.

In examining the appropriateness of a unit the Board utilizes a traditional community of interest analysis. See, *Lawson Mardon U.S.A., Inc.*, 332 NLRB 1282 (2000). The relevant factors considered by the Board are bargaining history, the functional integration of operations, the differences in the types of work and the skills of employees, the extent of centralization of management and supervision, particularly as to labor relations and control of day-to-day operations, and the extent of interchange and contact between the groups of employees. See, *Edenwald Construction Co.*, supra at 297; *Naccarato Construction Company, et al.*, 233 NLRB 1394 (1977). The inquiry is not whether the proposed unit is the most appropriate or comprehensive unit, but simply whether it is an appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950). Although not controlling, a union's desire is a relevant consideration in determining the appropriateness of a unit. *Marks Oxygen Co.*, 147 NLRB 228 (1964).

Applying the above factors to my analysis of the facts in this case, I find that the employees of the Employer's PA Division possess a separate and distinct community of interest from other employees employed by the Employer at its West Plant campus such that they form a unit appropriate for purposes of collective bargaining. Although the more comprehensive unit proposed by the Employer may also be appropriate for bargaining purposes, the record does not establish that the employees of the West Plant Catalyst Division possess such a substantial community of interest with the Employer's PA Division employees to compel their inclusion in the same unit. *J & H Plate, Inc.*, 310 NLRB 429 (1993).

There is no bargaining history in either the petitioned-for unit or in the broader unit advocated by the Employer. The Employer notes that a broader unit similar in scope and composition to that which it now advocates has been found appropriate in the past. In this regard, it points to prior decisions and directions of election and a stipulated election agreement issued by this Region. However, these decisions are not dispositive in evaluating the appropriateness of the unit requested in the current petition. In two of the three petitions, which arose between 1997 and 2000, the petitioning union sought a wall-to-wall unit similar to that advocated here by the Employer. However, the appropriateness of a different unit was not considered or litigated. In the third petition, the petitioner sought a craft unit of electricians in the Employer's maintenance department. This unit was found to be inappropriate as the electricians did not constitute a true craft unit and did not share a community of interest separate

and apart from the Employer's other maintenance department employees. Once again, this is not the issue that is now before me. The appropriateness of other less inclusive units was not considered in the prior decisions and directions of election as the petitioner did not wish to proceed to election in any unit other than the one for which it had petitioned.

In considering the functional integration of operations, it is clear from the record that the PA Division is almost completely separate from the Employer's Catalyst Division operations. Indeed, the Employer's HR manager, Hinrichs, testified that the sale of the PA Division would have no effect on the Catalyst Division. In this regard, I note that the PA Division's manufacturing, maintenance, and warehouse operations take place in buildings separate and apart from the Catalyst Division's manufacturing, maintenance, and warehouse operations. Additionally, the PA Division's manufacturing processes are distinct from the Catalyst Division's manufacturing processes and the thickener and related products manufactured by the PA Division are dissimilar to the catalyst products manufactured by the Catalyst Division. The two divisions do share some resources such a cherry picker and steam and natural gas used in the manufacturing process by the PA Division is provided by the Catalyst Division. Finally, the main stockroom is located within the Catalyst Division and it is used occasionally by PA Division personnel for supplies and materials that are not typically maintained in the PA Division's maintenance operation. Both divisions have their own break and lunch facilities, separate shower and locker rooms and all time punch clocks located in the vicinity of their respective work areas. On balance, I find that this factor strongly militates in favor of a separate and distinct community of interest for the PA Division employees.

Regarding differences in the type of work and skills of employees, the record discloses that all of the production employees at the West Plant are engaged in some type of manufacturing process. However, the record does not contain a great deal of information about these processes. What is known is that the Employer considers an operator, warehouse, and maintenance employee at certain grade levels in one division to generally possess the same aptitude as production, warehouse, and maintenance employees in the other division. There are, however, some differences in the manufacturing processes and there was testimony that an employee could not simply commence production work in another division without some training in the processes being used in that division. Employees in both divisions work different shifts, but some operations in both divisions require continuous staffing. As a whole, I do not find that this factor militates strongly for or against inclusion of the Catalyst Division personnel in an appropriate unit.

Management and day-to-day supervision between the two divisions is almost entirely separate. Dr. Thomas Marks is President and CEO of the Employer. He is the Employer's highest ranking manager in the United States. He is also the lowest ranking manager, excluding human resources personnel, who is over both the PA Division and Catalyst Division at the West Plant. Excluding human resource related functions, the lone exception to the separate nature of management and supervision between the two divisions lies with the Catalyst Division shift coordinators. In the event of an emergency situation, a Catalyst Division shift coordinator may be contacted by PA Division personnel for assistance on the weekends or off shifts. It is not clear how often this occurs and the Catalyst Division shift coordinators are not called upon to supervise PA Division employees. Utilizing separate management and supervision as a distinct

factor, I find that this factor strongly militates in favor of finding that the Petitioner's proposed unit possesses a separate and distinct community of interest from other West Plant employees.

In contrast to management and supervision, human resource functions are centralized and cover all employees in the West Plant and the South Plant. Human Resources Manager Hinrichs has one of his offices on the West Plant campus. He reports to Human Resources Vice-President Maisch. Hiring, firing and disciplinary actions for the entire West Plant are routed through the Employer's HR department. Additionally, employee training, including mandated safety training, is coordinated through the HR department and training sessions include employees from both divisions. Thus, this centralized control of labor relations is consistent with a campus-wide unit as perhaps being more appropriate.

Finally, I turn to an examination of the extent of interchange and contact between PA Division and Catalyst Division employees. First, I note that there is almost no day-to-day work related contact between the employees in the two divisions. The area covered by the West Plant Complex is quite large and the different manufacturing operations, even many within the Catalyst Division alone, are largely self-contained. Contact during non-work time is also limited as employees in both divisions have separate facilities for their personal needs. Accordingly, contact between employees in the two divisions is largely limited to the temporary and permanent transfer of employees between the two divisions. However, the record reflects that temporary interchange of personnel between the two divisions does not occur on a regular basis. Thus, the only examples of temporary interchange between the divisions in the last several years either involved a supervisor providing temporary assistance to the other division or unusual circumstances, such as the explosion that occurred a few years ago which temporarily shut down the PA Division's manufacturing operation and resulted in the short term transfer of some production employees to the Catalyst Division operation. As the record reflects, the temporary interchange of personnel is often rendered unnecessary by the Employer's use of temporary labor services to fulfill its short-term personnel needs.

There has been some permanent interchange between the two divisions. In fact, the vast majority of PA Division employees either began working for the Employer in the Catalyst Division or worked in that division at some point during their employment. The Employer's recent "freeze" on transfers between the two divisions at least temporarily brought permanent interchange to a halt. However, even without the freeze it appears that permanent interchange in recent years has declined as a result of several factors, including a reduction in the overall workforce through layoffs. Regardless, it is clear that permanent interchange between the two divisions occurs, but the degree of such interchange may be influenced at times by various factors. In evaluating the separate nature of the community of interest of the PA Division employees vis a vis the Catalyst Division employees, I find this factor somewhat equivocal. However, on balance, it somewhat militates in favor of a separate and distinct community of interests for the proposed unit as there is so little daily contact and temporary interchange between the two divisions and the lack of such interchange on a daily basis reinforces the separate nature of the two divisions.

Based on the above analysis and the record as a whole, I find that the evidence does not demonstrate that such a substantial community of interest exists between employees of the

Catalyst Division at the West Plant and employees of the PA Division so as to compel their inclusion in the same unit or would make the unit sought by the Petitioner inappropriate.

Thus, having carefully considered the arguments of the parties at the hearing and in their briefs and supplemental briefs, I find that the record does not mandate the inclusion of the Catalyst Division employees in the same unit with the Employer's PA Division employees whom the Petitioner seeks to represent and that the Employer's PA Division employees constitute an appropriate unit for the purposes of collective bargaining. Accordingly, I will exclude the Catalyst Division employees from the unit.

### **Stockroom Clerk**

Turning to an examination of the remaining unit composition issues, I find that there is no basis to include the stockroom clerk in the unit sought by the Petitioner. The record discloses that this employee reports to a Catalyst Division supervisor and that his work environment – the main stockroom – is located within the Catalyst operations. Additionally, the record discloses that the stockroom clerk has only occasional work-related contact with maintenance employees from the PA Division, who may require atypical supplies, materials, or other equipment not commonly used in the PA Division or stored in their own maintenance department. This attenuated connection between the stockroom clerk and PA Division employees certainly does not require the inclusion of the stockroom clerk in the proposed unit. Accordingly, I will exclude the stockroom clerk from the proposed unit.

### **Quality Control Technician**

Regarding the three quality control technicians who perform testing functions for the PA Division, I find in agreement with the parties, that they should be included in the proposed unit as they share a community of interest with the other PA Division employees. Thus, unlike the stockroom clerk, all of their work is performed for the PA Division. Moreover, if there is a sale of the division, they will be offered positions with the purchaser and will likely continue to work for the successor employer. They have regular work-related contact with PA Division employees. Although much of the contact takes place via facsimile transmissions, they occasionally perform functions at the manufacturing location and interact with production employees in the performance of those functions. In addition, unlike the stockroom clerk, the PA Division's quality control technicians will have little opportunity for representation for purposes of collective bargaining if they are not included in the proposed unit, as they may constitute a residual grouping of just three employees. Accordingly, and noting the Petitioner's willingness to represent these employees in the proposed unit, I find that the quality control technicians who are currently based at the Hill Street location and are engaged in testing functions for the PA Division are appropriately included in the proposed unit and are eligible to vote.

## **VI. SUPERVISORY EXCLUSIONS FROM THE UNIT**

The record shows and I find that the following persons are supervisors as defined in the Act: President and CEO, Dr. Thomas Marks; Global Business Unit Manager, Don Colyer;

Business Unit Manager and Executive Vice-President, Dr. John Ray; Business Unit Manager, Dr. R. Siva Subramanian; Operations Managers, Bob Weis and Bill Furlong; Production Managers, Rob Drucker, Wayne Coffey, Cathy Holthouser, Richard Allen, and Steve Ledford; Maintenance Supervisors, Steven Lewis, George Rogers, Bruce Webber, and Danny England; Warehouse Managers, Scott Etherton and Ted Kessinger; Shift Coordinators, Pat Ernst, Roland Simpson, Kenny Losch, and Leonard Lewis; Team Coordinators, David Nash, Suzanne Cox, Rod Jones, Kevin Northway, Dennis Chumley, William Miles, Duane Bishop, Pat Loi, and Eric Williams; Vice-President Human Resources, Charles Maisch; and Human Resources Manager, Scott Hinrichs. Accordingly, I will exclude them from the unit found appropriate.

## VII. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**All production, maintenance, warehouse, and Hill Street quality control employees employed by the Employer at its Louisville, Kentucky, West Plant Complex in its Performance Additives Division, but excluding all Catalyst Division employees, the stockroom clerk, and all other employees, managers, and guards and supervisors as defined in the Act.**

## VIII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Chemical Workers Union Council, UFCW. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **August 12, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.



### **C. NOTICE OF POSTING OBLIGATIONS**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **IX. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **August 19, 2005**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 5<sup>th</sup> day of August 2005.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

### **Classification Index**

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